No. 6112

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

SWIFT AND COMPANY (a corporation organized and existing under and by virtue of the laws of the State of West Virginia),
Appellant,

vs.

FREDA DALY, as administratrix of the estate of Stewart Daly, deceased,
Appellee.

BRIEF FOR APPELLEE

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BRIEF OF APPELLEE

The counsel for the plaintiff at the conclusion of the argument which was made only on the measure of damages, because he expected and had announced previously in the argument that he would request the Court to grant a motion for a peremptory verdict as to all features except damages, stated:

Mr. Maury (at the end of the argument): "And now having argued the measure of damages in this case,

I submit that your Honor should instruct the jury peremptorily to find a verdict for the plaintiff in this case." (69 R. 15-20.)

There was no objection or protest from defendant's counsel. The court then instructed the jury peremptorily. (75 R. 20-23.)

Concluding his charge, the court asked, "Any exceptions for the plaintiff?"

Mr. Maury: "No, sir."

The Court: "Any for the defendants?"

The record is silent. No exception was taken. The record is perfectly correct. It was prepared by the appellant as to the bill of exceptions. In addition to the bill of exceptions the Clerk's minutes show the same state of the record. (20 R. 16-23.) There was no exception to the verdict. (21 R. 5-10. 76 R. 15.)

Under the state practice in Montana, error cannot be predicated on the ruling of a trial court unless it be objected to or protested at the time it is made. The motion of plaintiff's counsel was foreshadowed before it was made and there was neither objection nor protest. The court granted the motion and charged accordingly and asked for an announcement of any exception that the defendant might have and none was stated.

While, whether any review would be made of similar action of a trial court by a Montana appellate court, is somewhat moot, yet we would say that the absence of a protest or objection to the motion for the peremptory instruction would completely deprive the appellant here of any right to review in a Montana state court; the

absence of any exception deprives the appellant of any right to review in this court. The practice respecting exceptions in the Federal courts is unaffected by the conformity act, Rev. Stat. Sec. 914, U. S. C. title 28, Sec. 724. United States v. United States Fidelity & G. Co., 236 U. S. 512; 35 Sup. Ct. Rep. 298.

In Montana, by special statute, it is permitted a defendant to assert for the first time in the appellate court, that a complaint does not state facts sufficient to constitute a cause of action. The rule at common law and in the Federal courts is that such defect as may exist may be cured by verdict submitted to without objection by the defendant. If the defendant still claimed a defect of any kind in the complaint (there was no defect, the complaint was entirely sufficient in every particular) it was its duty in order to avoid the effect of the court's instructions to reassert at that time that the motion to instruct peremptorily should not be granted because of any claimed deficiency of the complaint or because of error previously made, if claimed, in overruling the demurrer.

However, the learned counsel in printed argument does not charge that the complaint was not sufficient to state a cause of action. By putting in testimony after the denial of the motion for non-suit, the defendant waived any exception that it took to that act of the court.

> *Union Pacific Railway v. Daniels,* 152 U. S. 684.
> *Courtnay v. Kind* (C. C. A. 9th), 220 Fed. 112.
> *Erie Ry. Co. v. Linnekogel,* 248 Fed. 389 (C. C. A. 2nd).

Likewise the objection that the evidence is insufficient to justify the verdict is not open to the defendant in view of the failure of defendant at the close of the trial to move for a directed verdict or request a perempory instruction.

> *Sharpless Separator Co. v. Skinner* (C. C. A. 9th), 251 Fed. 25.
>
> *McBride v. Neal* (C. C. A. 7th), 214 Fed. 968.

> In an action at law the burden is on the plaintiff in error to establish the existence of those errors of which he complains, and in the absence of proof by the record that a question of law arose, and that it was presented to and ruled upon by the Court below no error is established, because none could arise concerning a question which was not presented, considered or decided by the trial court (citing authority). Because there was no request, and no ruling on a request, for a peremptory instruction in favor of the plaintiff, and because there was no exception to any ruling relative to the matters now assigned as error, there is nothing in this case for this court to review.
>
> It is indispensible to a review in the Courts of the United States of any ruling of a trial court on the admissibility of evidence, or in the charge of the Court, or the submission of the case to the jury that the ruling of which complaint is made should be challenged, not only by an objection, but by an exception taken and recorded at the time, to the end that the attention of the trial judge may be sharply called to the question presented, and that a clear record of his action and its challenge may be made."
>
> *Mexico Co. v. Larkin* (C. C. A. 8th) 195 Fed. 495.

We therefore, think it aptly in order and we do now move the court to affirm the judgment without further

examination of the record than such as has been suggested; or to dismiss the appeal.

R. Lewis Brown,
George R. Maury,
H. Lowndes Maury,
Attorneys for the Appellee.

Without waiving the foregoing motion, we assert that the action of the trial court was in all respects correct, and should be affirmed even if legally challenged in the court of appeals. There is no plea of contributory negligence in the answer. The first plea of that kind appears in the brief of counsel in the appellate court and in the argument.

In Montana, the rule is the same as the rule in the Federal courts, but the Federal court rule is applied even when the trial is had and the cause of action arose in a state where the practice is that contributory negligence must be negatived in the complaint or declaration. *Hemingway v. Ill. Cent. Ry. Co.* (C. C. A. 5th) 114 Fed. 843.

Naivity is displayed by a plea that is in the answer of the appellant. The statement in this plea of fellow service disperses most of the argument found in appellant's brief. After discussing independent causes, independent contractors, too restricted construction of the statute, and other questions raised by counsel, this plea ends up with the following words, "that any injuries inflicted upon the said Stewart Daly, were caused by

the negligence of a fellow servant, his own employer and co-servant." (16 R. 7-10.)

A fellow servant and a co-servant necessarily implies a common master. The common master here was Swift and Company, the appellant, as alleged in the complaint and proven in the testimony. The work was being done on the premises owned, possessed, controlled by Swift in the furtherance of its business and in hazardous work which it could not delegate to an independent contractor so as to relieve itself from liability if it was done illegally or negligently.

Much of the appellant's brief is addressed to the idea that Mottleson's violation of the statute introduced an independent supervening cause which cut off the operation of the other cause. It seems to us that the learned counsel neglect to consider the elementary rule of law that there may be more causes than one which pervades the law of torts and likewise the counsel neglect to consider that two persons may join in the same tort.

The record is a complete answer to every statement made in the brief. Part of counsel's brief is devoted to the parties being in pari delicto and they indulge the presumption that the boy's father and mother committed a breach of the criminal code when there is no evidence to sustain the assumption of counsel. The ordinary presumption is that they did not, and the testimony of each of them is that neither one knew that the boy was working in the plant or near the elevator.

Freda Daly, the mother, says: "I did not know at any time between the 20th and 24th days of August,

1928, that my son, Stewart Daly, was working on the premises of Swift and Co." (38 R. 15.)

Phil Daly, the father, says: "I did not know at any time between the 20th of August, 1928, and the 24th of August, 1928, that my son was working on the premises of Swift and Co." (39 R. 16.)

Some of the counsel's brief is devoted to the question of whether Swift should have knowledge or not of the presence of the boy in the plant and on the elevator. It is alleged in the complaint, paragraph 9:

> That continuously eight hours each day or thereabouts from Monday, the 20th day of August, 1928, until Friday, the 24th day of August, 1928, Swift & Company being engaged in business in Montana knowingly and negligently and wrongfully and unlawfully permitted to be employed and to render and perform services and labor in, on, and about a certain freight elevator in its plant at 724 South Arizona Street in Butte, Silver Bow County, Montana, Stewart Daly, a child under the age of 16 years, to wit, of the age only of 11 years, 8 months and 22 days, and the said elevator being in operation constantly during such time, and such employment and service and labor of the said child, Stewart Daly, being at all times, until after he was injured, unknown to Philip Daly, the father of the said child, and unknown to the mother, this administratrix, and such conduct of Swift & Company was a proximate and efficient and a direct cause of the injury to Stewart Daly, hereinafter set out, and the elevator in motion overturned on Stewart Daly the (6) half fly-wheel and so injured him that he died after lingering about three days.

This allegation in the complaint may be considered in connection with other allegations in the complaint

that the boy was an invitee of Swift and Company about the basement and elevator shaft, that Swift and Company owned the packing plant, had many servants working therein and occupied, controlled, possessed and packed meats in the said packing plant. (4 R. 1.) There was a further allegation that Mottleson and York Ice Machine Company, in making the said contracts and in doing the work, were furthering solely and entirely the plan of work and the business designs of Swift in its premises, in its plant occupied, etc., by Swift. These allegations were followed by testimony so convincing that a judge is not warranted in law in submitting to a jury the negative of such facts for a speculative verdict.

W. J. Young was the manager of the Butte Branch plant of Swift and Company. (51 R. 15.) He says: "I saw Stewart Daly upon the premises. I don't remember whether that was the second or third day." (52 R. 16.) "I first saw Stewart Daly in the basement which was not a place for customers but a place for employees. That might have been two or three days before he was hurt. Richards is the branch house foreman over the men in the branch house. House foreman, we call him, and that includes the basement." (53 R. 20.)

Richards, the floor manager, was at work on August 20th, 21st, 22nd, and 23rd. (54 R. 16.) Quoting from testimony of Richards: "I saw the boy picking up bolts and helping Mr. Mottleson around there, handing the men tools, wrenches, picking up bolts and bolt heads. When Mr. Mottleson started to dismantle the ice ma-

chine the boy was there and was there all the time Mottleson was on the floor until the boy was injured." These witnesses were produced by the defendant.

We call to the attention of the court the words in our statute which are not often found in other statutes of a similar import: "Or permit to be employed," and also the words "to render or perform any service or labor whether under contract of employment or otherwise." These words precede "in, on, or about any work shop, factory or passenger or freight elevator." The statute is correctly copied in the brief of appellant's counsel so that any obedience to the rule by us would be surplusage. The words "or permit to be" are not found in the North Carolina statute but that court said that such words were implied.

We quote a paragraph from a North Carolina case that will interest the court we think, even though the court in our opinion should grant the motion to affirm or dismiss. *McGowan v. Ivanhoe Co.* (N. C. 1914), 82 S. E. 1028, N. C. C. A. Vol. 7, p. 867.

> "In the case referred to, the fact of the minor being a regular employee was unquestioned, while, in the present case it may become a matter of dispute, but the language of the act is that no child under twelve shall be employed or worked in any factory, etc., and if this child though not on the regular pay roll, was permitted to work at the mill to the knowledge of the owner, superintendent, or other agent fairly representing the management, or if he worked there so openly and continuously that the management should have observed and noted his occupation and conduct, his case would come within the terms and meaning of the law."

Other cases in point and on proximate cause:

> *Wind River Lumber Company v. Frankfort Marine Company* (C. C. A. 9th, 196 Fed. 340).

The court there says: "The statute should be construed in harmony with its purpose which was to protect children and to regulate their employment." . . . "When the condition on which a minor is permitted to be employed is disregarded, his employment is as illegal as if he were employed in the face of an absolute prohibition."

Also in point are:

> *Purtell v. Philadelphia, etc.* (Ill.), 99 N. E. 899;
> *Evans v. Dare Lumber Co.* (N. C.), 93 S. E. 430, 30 A. L. R. 1498;
> *Queen v. Coal Co.* 32 S. W. 460.
> *John v. Northern Pacific Railroad,* 42 Montana at 46 (not in pari delicto).

The Federal Judges are not merely moderators of a town meeting. A dispute which warrants submitting particular issues to a jury in a Federal court is a substantial dispute and involves a substantial conflict of evidence. Here there was no conflict at all except on the question of damages. One of the counsel in this case was counsel in the first case where the Montana Supreme Court construed the survival statute. The case is mentioned in appellant's brief: *Melzner, Admr. v. Northern Pacific Railway Co.,* 46 Mont. 162. Refreshing the memory from a brief written in that case a $5,000 verdict was sustained where the death occurred

very quickly after the injury in *Kyes v. Valley Telephone Co.* (Mich.), 93 N. W. 623, and the same amount in *Hesse v. Meriden Coal,* 54 Atl. 299. In the Melzner case cited by counsel the amount of the verdict sustained does not seem to appear in the printed report. Opposing counsel will not disagree if an inspection of the files is made in our statement that the amount was $14,000 finally affirmed.

No contention was made in the trial court by answer or by statement of counsel that the parties were in pari delicto. Motion for non-suit (44 R.-45 R.) The theory of a case may not be changed between trial court and appellate court as a general thing. The three cases cited at the close of appellant's brief are on different statutes. The Melville v. Butte-Balaklava C. Co. was on a statute which made both employer and employee guilty if the eight-hour law were not observed. The Jackson v. Lomas case cited, held that a child injured through firing a squib contrary to a City Ordinance was equally guilty with a merchant selling the squib against the provisions of another section of the ordinance. It is noticeable that the statute on which this case is based does not make working contrary to its terms criminal, but merely the employing or permitting to be employed, criminal.

We submit that the judgment should be affirmed or the appeal dismissed.

Respectfully,

R. Lewis Brown,
George R. Maury,
H. Lowndes Maury.